

**ADMINISTRATIVE APPEAL DECISION  
WILLIAM WYCKOFF, FILE NO. 199901553  
KANSAS CITY DISTRICT**

**DATE** \_\_\_\_\_

**Review Officer:** Mores V. Bergman, U.S. Army Corps of Engineers (USACE),  
Northwestern Division

**Appellant:** William Wyckoff, Route 1, Box 37, Moundville, MO 64771

**Receipt of Request For Appeal (RFA):** July 3, 2000

**Appeal Conference Date:** September 6, 2000 **Site Visit Date:** September 6, 2000

**Background Information:** On May 10, 1999, William Wyckoff requested a permit, from the Corps of Engineers Kansas City District, to construct a drainage ditch across an adjacent landowners property to increase drainage and alleviate chronic flooding and standing water on Mr. Wyckoff's property. On June 2, 2000, the District Engineer, Kansas City District, denied the permit request based on his determination that the proposed project would have unacceptable impacts to aquatic resources in the Drywood Creek Watershed in Vernon County, Missouri, and since other less environmentally damaging practicable alternatives exist. On July 3, 2000, Mr. Wyckoff appealed the decision to the Division Engineer, Northwestern Division, in accordance with the Corps of Engineers Regulatory Appeals Regulation 33 CFR 331. An administrative appeals conference and a site visit were held concurrently on September 6, 2000

**Reasons For Appeal:** Presented by Appellant

**Reason 1:** There are no practicable alternatives, which will solve the Wyckoff drainage problem.

**Reason 2:** The agency's fact determinations concerning the effects of the applicants' proposal are erroneous.

**Reason 3:** The agency has failed to give adequate consideration to proposed changes or modifications to the proposal, which would minimize the impact on wetlands.

**Summary of Decision:** I find that the appeal does not have merit. I find that: 1.) The District did identify that at least one practicable alternative exists that is less environmentally damaging than the proposed project, and that would meet the applicant's project purpose; 2.) The facts presented by the District as to the effects the project would have on the aquatic environment are not erroneous and are supported in the record by sound technical evaluations and conclusions; and, 3.) The District did give adequate consideration to the applicant's proposed changes or modifications, but concluded that they would have essentially the same impacts as the applied for project, or were not acceptable as mitigation for project impacts.

## **Appeal Evaluation, Findings, and Directions for District Action**

**Reason 1:** There are no practicable alternatives, which will solve the Wyckoff drainage problem.

**FINDING:** Appeal Reason 1 does not have merit.

**ACTION:** No action required.

**DISCUSSION:** In the 404 (b)(1) Evaluation, dated June 2, 2000, which forms a part of the Kansas City District's decision document, the District identified an alternative that would meet the project purpose and would have less impact on the aquatic environment than the applicant's proposed project. The alternative identified by the District is to clean out and maintain existing township road ditches and culverts adjacent to the Wyckoff property, and to excavate minor surface drainage ditches in the areas of the Wyckoff property where water ponds during periods of high rainfall. This alternative would require no permits from the Corps and would have little if any impact on the existing wetlands.

In a letter dated March 2, 2000 (Encl. 1), to the Kansas City District (KCD) from Mr. Kendall Vickers (Attorney for Mr. Wyckoff), it is acknowledged by Mr. Vickers that the above mentioned alternative "would drain most of the water from the area" on the affected Wyckoff property. The letter further states that Mr. Wyckoff is willing to consider this alternative.

At the September 6, 2000 appeal conference with the review officer, Mr. Bergman, which was attended by Mr. Wychoff and his attorney, Mr. Vickers, and Joseph Hughes and Rodney Christensen of the KCD, a statement was made by Mr. Vickers that he did not believe that the road ditch maintenance alternative could be considered a "practicable" alternative. The reason given was that the alternative may not be a reliable alternative or may not even be available, because maintenance of the road ditches was at the sole discretion of the Township Board, so at any given time the Board might decide that cleaning out of specific road ditches or maintaining them over the long-term, was not necessary or was a low priority. He also stated that there was no assurance that the Board would allow Mr. Wyckoff to maintain the ditches. There is, however, no mention of this possibility in Mr. Vickers's letter of March 2, 2000, or anywhere else in the administrative record for the Wyckoff case. Mr. Christensen, who was the KCD project manager for the permit application, stated, at the appeals conference, that he had spoken with a member of the Township Board and was informed that the Board was willing to clean out the road ditches along the Wyckoff property. There also is mention of a plan by the Township to improve drainage and clean out ditches along the Wyckoff property in a letter dated April 26, 1999 (Encl. 2), to the Corps of Engineers from Jason Wyckoff (nephew of William Wyckoff). Also, since it is the authorized responsibility of the Township board to maintain existing roads and drainage along Township roads, it seemed

reasonable, lacking any information to the contrary, for the KCD to conclude that the identified alternative was available.

At the site visit that was performed in conjunction with the appeal conference on September 6<sup>th</sup>, the group (named above) investigated the location and condition of the road ditches, and other drain-ways, along the Wyckoff property and also those leading away from his property. It was confirmed that the road ditches and some culverts were in fact “silted-in”, and currently not able to provide good drainage. It was also observed that there appeared to be adequate space along the road right-of-way to clean out and, if necessary, to enlarge the capacity of the existing ditches. It was further noted during the site visit that other possible alternatives may exist, such as constructing a new ditch parallel to the existing road ditches, but on the adjacent Meech property. Mr. Wyckoff had previously received permission to cross the Meech property with his proposed project. It is, therefore, likely that he could receive permission for this alternative as well. It is also probable that this parallel ditch alternative could be built without a permit from the Corps (no discharge in a water of the US), or could be constructed in such a way as to have minimal impact on an existing wetland. An advantage of this alternative is that it would not require approval from the Township board, since it could be built entirely on private land.

The Clean Water Act Section 404(b)(1) Guidelines govern the evaluation of proposals to fill waters and wetlands. They restrict discharges into aquatic areas where less environmentally damaging, practicable alternatives exist. The guidelines make two presumptions against discharges. The first is that an alternative with less adverse impact is available; this presumption must be rebutted for both water and non-water dependent activities. The second is that non-water dependent activities do not need to be placed in special aquatic sites, practicable alternatives are presumed to exist unless clearly demonstrated otherwise. In contrast to the public interest determination, the burden of proof rests with the applicant, not the District Engineer.

In the present appeal, Mr. Vickers has indicated that this is not a practicable alternative because even if the township granted an easement to use the public right of way to drain the property, this would not bind future townships. Although this information was not contained in the administrative record for the Wyckoff case, and therefore is not required to be considered in the appeal, it is concluded that this information does not give reason to change the appeal decision. First, there is no documentation in the file that indicates the applicant sought permission from the township to repair and clean existing drainage ditches. Nor is there any documentary evidence to indicate the Township will not itself perform such maintenance. With respect to this latter point, it appears from the information submitted with the permit application, in the Supplemental Application Information, Block 19, that the township is willing to construct an alternate ditch as well as “clean out” the existing ditch, but that this work has been delayed pending a decision on your permit. With respect to this alternative I do not find the applicant has carried the burden of proof to show this is not a practicable alternative.

Upon consideration of the information as discussed above, it is concluded that the Kansas City District made a correct and reasonable determination that alternatives to the applicant's proposed project do exist, which would have less impact on the aquatic environment and satisfy the project purpose and the applicant has not carried the burden of proof to show that the alternatives suggested are not practicable. Therefore, this reason for appeal does not have merit.

**Reason 2:** The agency's fact determinations concerning the effects of the applicant's proposal are erroneous.

**FINDING:** Appeal Reason 2 does not have merit.

**ACTION:** No action required.

**DISCUSSION:** In reviewing the Kansas City District's Statement of Findings and supporting documentation contained in the administrative record, several documents are found that do confirm the validity of the Kansas City District's determination regarding the effects of the applicant's proposal. In the KCD Environmental Assessment dated April 17, 2000, the District has identified that the project, which would involve the draining or filling of approximately 375 acres of wetlands, would have adverse impacts on water quality, soil control, fish and wildlife, vegetation, flood control, esthetics, and recreation. Also analysis by other State and Federal resources agencies, that are recognized as experts in the field of water quality and wetland issues, corroborate the KCD's determinations concerning the adverse effects that the applicant's proposed project would have on wetlands and other aquatic resources in the project area. Letters from the Missouri Department of Conservation (dated November 5, 1999 (Encl. 3)), the Missouri Department of Natural Resources (dated November 2, 1999 (Encl. 4)), and the Environmental Protection Agency (dated November 12, 1999(Encl. 5)), support the conclusion that approximately 375 acres of wetlands would be adversely affected if the Wyckoff drainage ditch were to be constructed as proposed.

Information found in the administrative record that may be the basis for Mr. Wyckoff's Appeal Reason 2, are found in Mr. Vickers's letter of March 2, 2000. In the letter Mr. Vickers states that the wooded wetland areas, where Mr. Wyckoff's proposed ditch would cross, are "primarily brush" and of "no commercial value". This may be true, but it is the environmental value of the wooded wetlands, and the adverse impacts the proposed project would have on those wetlands, that is of concern to the Corps of Engineers in this case. Mr. Vickers's also pointed out in his letter that he has calculated the length of the proposed ditch to be only 1580 feet long instead of the 2640 feet that is stated in the permit application. If this is correct, it would reduce the amount of wetland converted by the ditch excavation by approximately one-fourth acre. The difference in environmental effect of this change would be minor compared to the overall effect of the project. Mr. Vickers also stated in his March 2<sup>nd</sup> letter that the existing drain-way across the Meech property currently drains approximately the same area as Mr. Wyckoff's proposed ditch would drain (Note the Wyckoff ditch proposal would also cross the Meech property). Wetland determinations by the Natural Resource Conservation Service and the Corps

conclude that the existing drain-way on the Meech property does not currently effectively drain the area, which has resulted in the continued existence of many wetlands. Also, contrary to what Mr. Vickers has stated, the existing drain-way is not currently an authorized structure. If the Wyckoff ditch were allowed to be constructed as currently proposed, these wetlands could in fact be drained. Thus, the effects of these two drainage structures would not be the same. Since the existing drain-way is not an authorized project, it would require a permit from the Corps to be modified to operate as an effective drain. As stated in the Statement of Findings for the Wyckoff permit action, it is not likely that a permit would be issued for that activity.

Another argument that was provided by the appellant in support of Appeal Reason 2, was a statement made by Mr. Vickers at the appeal conference. At that time he had said that he did not agree that the alternative that the KCD had identified as being a practicable alternative (See discussion in Reason 1 above), would actually meet Mr. Wyckoff's intended project purpose. The facts provided in the discussion of Reason 1 above rebut this contention.

The last reason set forth by the appellant in support of Appeal reason 2 is contained in the September 11, 2000 Letter of Supplement to Appeal. In it, Mr. Vickers indicates that the practical alternative set forth by the District Engineer would not only require maintenance of existing road ditches and culverts it would also be necessary to construct a ditch ½ mile north to obtain drainage. At the appeal conference site visit on September 6, 2000, it was discussed and clarified that the practicable alternative identified by the District in their decision document, does include maintaining other adjacent road ditches, in addition to the ditches immediately adjacent to the Wyckoff property, to include the road ditch going north toward the river. Since the District had already considered the information contained in paragraphs 2 and 3 of the letter, in reaching their decision, it is concluded that this information would not effect the District's decision or change the determinations made above regarding Appeal Reasons 2 and 3.

After reviewing the information in the record as discussed above, it is concluded that Appeal Reason 2 does not have merit.

**Reason 3:** The agency has failed to give adequate consideration to the proposed changes or modifications to the proposal, which would minimize the impact on wetlands.

**FINDING:** Reason 3 does not have merit.

**ACTION:** No action required.

**DISCUSSION:** The letter dated March 2, 2000, which was submitted to the KCD by Mr. Vickers, discussed a proposed alternative to Mr. Wyckoff's original alternative that consisted of improving the existing drain-way across the Meech property instead of constructing a new ditch. The existing drain-way discussed here is the same unauthorized drain-way that was mentioned in the discussion under Appeal Reason 2, above. The KCD's Findings of Fact dated June 2, 2000 does discuss this possible alternative and concludes that it would have essentially the same adverse environmental

impacts as the applied for project. The KCD had concluded that this alternative would likely not be a permissible project.

Mr. Vickers also discussed another proposal in his March 2, 2000 letter that might be categorized as a modification to minimize or mitigate impacts to wetlands. The proposal was to build a water detention structure (or structures) that would hold water on the low area of Mr. Wyckoff's land, (approximately 10 acres in size), to provide an improved wetland for the production of aquatic vegetation and the construction of blinds for waterfowl hunting. The KCD did address this proposal in their Statement of Findings and concluded that they could not consider this as minimization or as compensatory mitigation for impacts to wetlands since under the 404 (b)(1) guidance, measures to avoid impacts must first be done to the maximum extent practicable before minimization or compensatory mitigation can be considered. In the case of Mr. Wyckoff's permit application, it was determined that practicable alternatives did exist, so this proposal could not be accepted as part of a plan to off-set impacts of the ditch project, and as a way to possibly make the ditch project permissible. The applicant was informed by the KCD that if he desired to pursue the wetland/ waterfowl blind project as a separate permit application, the District would consider the proposal in that manner.

Also as set forth in the Letter of Supplement to Appeal dated September 11, 2000, the appellant's representative states that the agency has failed to give adequate consideration to proposed changes to the applicant's original proposal, which would minimize the impact on wetlands. The proposed change referred to in the supplement to this appeal is mechanized clearing of the existing unauthorized drainage, which was placed through the Meech property in the 1980s. As noted above, this modification would also degrade or convert the same wetlands as the applied for project. I concur in the finding by the District Engineer, that this alternative would likely not be a permissible project.

It is determined that the District did give adequate and appropriate consideration to the identified modification proposals, in accordance with the Corps' Permit Program Regulations. Therefore it is concluded that Appeal Reason 3 does not have merit.

**Conclusion:**

For the reasons stated above, I conclude that this administrative appeal does not have merit.

Carl A. Strock  
Brigadier General, U. S. Army  
Division Engineer

Enclosures